

Before the
COPYRIGHT ROYALTY BOARD
United States Copyright Office
Washington, DC

In re

Distribution of Digital Audio Recording
Royalty Funds

CONSOLIDATED
Docket No. 2008-3 CRB DD
(2007-2011 SRF)

OPPOSITION TO EUGENE CURRY’S MOTION TO RECONSIDER

Pursuant to 37 C.F.R. § 350.6(f), the Alliance of Artists and Recording Companies (“AARC”) hereby files its opposition to Curry’s “MOTION To Re-consider AARC PROPOSED ORDER FOR EUGENE CURRY DISMISSAL due to Extraordinary Circumstances” served on AARC on March 26, 2019. 37 C.F.R. § 350.6(f) (2019); Motion to Re-consider AARC Proposed Order for Eugene Curry Dismissal Due to Extraordinary Circumstances, In the Matter of Distribution of Digital Audio Recording Funds, Docket No. CONSOLIDATED 2008-3CRB-DD (2007-2011 SRF) (March 23, 2019) (“Curry Motion to Reconsider”). AARC respectfully requests that Curry’s document be rejected because Curry is not a participant in this consolidated proceeding and his filing seeks relief that is unnecessary. See Order Denying Powell Motion, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3CRB-DD (2007-2011 SRF) (March 25, 2019) (“Order Denying Powell Motion”); see also Order Denying Powell Motion for Enlargement of Time, Docket No. CONSOLIDATED 2008-3CRB-DD (2007-2011 SRF) (March 25, 2019) (“Order Denying Powell Motion for Enlargement of Time”).

Even if Curry’s filing could be interpreted as a reply to AARC’s opposition to his motion seeking leave to file a late petition, Curry’s request to file a late Petition to Participate should be denied because he fails to establish that there is “substantial good cause,” for the CRB to accept a

late-filed petition, as required by both the Copyright Act and the CRB regulations. 17 U.S.C. § 803(b)(1)(A)(ii) (2017); 37 C.F.R. § 351.1(d). Curry’s filing also fails to comply with the CRB’s order to “file a motion seeking leave to file a late Petition to Participate and *stating reasons (supported by facts and arguments)* the Judges should find that his request meets the conditions in section 351.1(d)” if Curry wants the CRB to allow him to file his petition after the January 25, 2019 due date. Order Granting AARC Motion to Reject Eugene Curry’s Defective Filing and Dismissing Eugene Curry, In the Matter of Distribution of Digital Audio Recording Royalty Funds, CONSOLIDATED Docket No. 2008-3 CRB DD (2007-2011 SRF), at 4 (Feb. 27, 2019) (emphasis added) (“Order Dismissing Curry”).¹

BACKGROUND

On December 26, 2018, the CRB published a notice announcing the commencement of a proceeding, with request for Petitions to Participate, to determine the distribution of the 2007 – 2011 Sound Recordings Fund royalties. Distribution of the 2007, 2008, 2009, 2010, and 2011 Digital Audio Recording Technology Royalty Funds for the Sound Recordings Funds, 83 Fed. Reg. 66,312 (Dec. 26, 2018) (“Consolidated Proceeding Notice”). The notice set a due date of January 25, 2019 for filing Petitions to Participate with the CRB. *Id.* at 66,312.

On December 22, 2018, more than *one month earlier* than the due date for filing a timely petition, Curry submitted his defective document through the e-filing system. Petition to Participate in the Consolidated Proceeding in the Distribution of Funds Remaining in Sound

¹ Curry also fails to meet the requirement imposed by Section 350.4 of the CRB regulations to submit a proposed order. 37 C.F.R. § 350.4. AARC, on the other hand, is not required to file this opposition with a proposed order as it is not “a responsive pleading that seeks alternative relief” but a simple denial of the original motion filed by Curry. *Id.*; see Procedural Regulations for the Copyright Royalty Board: Organization, General Administrative Provisions, 82 Fed. Reg. 18,563, 18,564 (Apr. 20, 2017) (“The Judges agree with the SDC that there is little utility in a proposed order that merely denies the relief sought by the moving party. The Judges have modified this provision to require responding parties to file a proposed order when they seek alternative relief.”). To expedite matters, AARC submits a proposed order since Curry failed to do so.

Recording Sub-funds, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (Dec. 22, 2018) (“Curry Filing”).

On February 1, 2019, AARC filed the Motion to Reject Eugene Curry’s Defective Filing. Motion to Reject Eugene Curry’s Defective Filing, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (Feb. 1, 2019) (“AARC Motion to Reject Curry”). AARC’s motion was granted by the CRB in its order dated February 27, 2019, which rejected Curry’s filing as “fatally inadequate because it fails to describe Mr. Curry’s significant interest in the proceeding and was not accompanied by either the filing fee or a statement that he would not seek more than \$1,000 in the proceeding” and dismissed Curry from the proceeding. Order Dismissing Curry at 3-4. In its dismissal, the CRB advised Curry that he could “promptly . . . file a motion seeking leave to file a late Petition to Participate and *stating reasons (supported by facts and arguments)*” to support his request to file a late petition. Id. at 4 (emphasis added).

In response to the CRB’s order, Curry filed a two-page document entitled “Motion for Leave to File a Late Petition to Participate.” Motion for Leave to File a Late Petition to Participate, In the Matter of Distribution of Digital Audio Recording Funds, Docket No. CONSOLIDATED 2008-3CRB-DD (2007-2011 SRF) (Mar. 5, 2019) (“Curry Motion Seeking Leave”). Curry’s document was filed merely eight business days later.

On March 20, 2019, AARC filed an opposition to the Curry Motion Seeking Leave accompanied by a proposed order because Curry had not included one as required by the regulations. 37 C.F.R. § 350.4; Opposition to Eugene Curry’s Motion for Leave to File a Late Petition to Participate, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3CRB-DD (2007-2011 SRF) (Mar. 20, 2019); Proposed

Order, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3CRB-DD (2007-2011 SRF) (Mar. 20, 2019) (“AARC Proposed Order”).

On March 23, 2019, Curry filed a motion requesting reconsideration of AARC’s proposed order to dismiss him. Curry Motion to Reconsider. In his filing, Curry claims to be a “care giver” of his “lady” who went through a cancer surgery and that he “ha[s]n’t been 100% focused to these hearings” and had “lack of focus this one time.” Id. However, no evidence supporting when this situation occurred was provided.²

LEGAL DISCUSSION

The CRB does not entertain filings by nonparticipants. Order Denying Powell Motion (rejecting David Powell’s filing submitted after he had been dismissed); see also Order Denying Four Motions from David Powell, In the Matter of Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III), Docket No. 16-CRB-0001 SR/PSSR (2018-2022) (Aug. 16, 2016). Notably, one of the CRB decisions cited above occurred in the current proceeding and so, Curry is fully aware of the fact that nonparticipants cannot file in a proceeding.

Additionally, in its order denying Powell’s another motion, the CRB determined that Powell’s “[m]otion is not ripe for consideration” because there is no time period needed to be enlarged. Order Denying Powell Motion for Enlargement of Time at 1. Therefore, the CRB denied Powell’s motion because he “seeks relief that is unnecessary.” Id. at 2.

² In his filing, Curry claims to include “a copy of Fox Chase test results as proof,” however, no such document exists on the eCRB. Curry Motion to Reconsider.

ARGUMENT

Curry's Filing Should Be Rejected Because He Is Not A Participant of the Proceeding And His Request To Reconsider Is Unnecessary

Curry's motion to reconsider AARC's proposed order should be denied. The CRB dismissed Curry from this proceeding on February 27, 2019, therefore, any motions other than the motion seeking leave to file a late Petition to Participate from Curry should be rejected given his status as a nonparticipant. Order Dismissing Curry; see Order Denying Powell Motion.

Additionally, AARC's proposed order is not an official order from the CRB and, currently, has no binding legal effect on Curry's right, if any, to participate in this consolidated proceeding. AARC Proposed Order. To date, the CRB has not issued any decision on Curry's original motion seeking leave to file late. Therefore, Curry's request is unnecessary.

Curry's Motion Should Be Denied Because He Failed to Establish Substantial Good Cause by Stating Reasons Supported by Facts and Arguments

Curry's filing should be denied even if it could be treated as a reply to AARC's opposition to his original request seeking leave to file a late petition. The CRB deadline for filing petitions has passed and to be permitted to file late, Curry must satisfy the requirements detailed in the statutes, regulations and the CRB's directive. Specifically, he must show "substantial good cause" by "*stating reasons (supported by facts and arguments)*" to support his request to file a late petition. 17 U.S.C. § 803(b)(1)(A)(ii); 37 C.F.R. § 351.1(d); Order Dismissing Curry at 4 (emphasis added).

In his most current one-paragraph filing, Curry alleges that his "lady" has been ill, and this is the reason that he failed to fully "focus" on "these hearings." Curry Motion to Reconsider. However, Curry has filed several documents, which, although failing to include the requisite information, were filed timely, and even early. So, it does not appear that Curry's inability to "focus" on this proceeding kept him from submitting his many filings. Moreover, the issue here

is whether there is significant good cause for allowing Curry to file a late petition to participate since the document that he *timely filed*, more than one month before the due date set by the CRB, was “fatally inadequate.” Curry Filing; Order Dismissing Curry. Also worth noting, is the fact that he quickly submitted a request to file late on March 5, 2019, in less than two weeks after the CRB rejected his defective petition. Curry Motion Seeking Leave. This request was also filed well before the deadline, but again was defective. Id. It is apparent that Curry’s ability to submit multiple filings before the deadlines has not been affected by his personal situation.

The issue of accepting a late Petition to Participate from Curry has occurred in a prior proceeding. In the 2013 Copyright Owners Subfund distribution proceeding, Curry failed to file anything by the due date for filing Petitions to Participate. In that proceeding, Curry alleged that his failure to meet the deadline was partly due to his having to “give personal care” to a friend living with him who was ill with arthritis. Petition to Participate, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. 14-CRB-0006 DART SR (CO/FA), at 1-2 (2013) (Aug. 26, 2015), Ex. A (“Curry Petition”). The CRB accepted his late-filed petition. Order Accepting Petition to Participate and Setting Schedule for Written Direct Statements, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. 14-CRB-0006 DART SR (CO/FA) (2013) (Jan. 6, 2016). It should be noted that although the CRB accepted Curry’s late Petition to Participate, Curry failed to fully participate in the proceeding, and neglected to file a direct case. Determination and Order, In the Matter of Distribution of 2013 Digital Audio Recording Royalty Funds, Docket No. 14-CRB-0006 DART SR (CO/FA) (2013), at 2 (Mar. 24, 2016), Ex. B.

Curry’s situation in the current proceeding is quite different from that in the 2013 proceeding. In the current proceeding, irrespective of his personal problems, Curry has had no difficulty meeting deadlines. The issue here involves the inadequacy of his filings. Order

Dismissing Curry at 3. Whereas, in the 2013 proceeding, Curry was alleging that he failed to file anything by the deadline because of his personal circumstances. Curry Petition at 1-2.

Although, we do not believe that Curry's personal situation provides substantial good cause for allowing him to correct his defective filings by submitting a late petition, he also fails to provide any evidence of the timing of his friend's illness. Therefore, it is impossible for the CRB to even consider the affect, if any, that this matter could have had on his December 22, 2018 filing. Curry Motion to Reconsider.

CONCLUSION

WHEREFORE, in view of the foregoing, AARC respectfully requests that the CRB deny the Curry Motion to Reconsider because Curry is no longer a participant of the proceeding, and the motion is unnecessary. Additionally, the Curry Motion to Reconsider fails to establish "substantial good cause" for the CRB to accept a late-filed petition to participate from Curry. Therefore, we respectfully request that the CRB confirm Curry's dismissal from this proceeding.

Respectfully submitted,
On Behalf of AARC

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March 28, 2019

Exhibit A

UNITED STATES COPYRIGHT ROYALTY JUDGES

LIBRARY OF CONGRESS

Re.

Distribution of DART Royalty Funds.

Docket No. _0006_DART

SR (CO/FA) 2013

Petition to Participate

Individual claimants Eugene "Lambchops" Curry/ TAJAI MUSIC INC.,

Hereby request that the CRB Judges, allow me to present this petition to be able to receive a portion of the 2% remaining in the Sound Recording Fund. My reason for missing the original date was '1. State of Confusion on why the ARRC, and their representative after always receiving 98% of this fund year after year, when I originally requested 1% of the remaining amount they then like always request that I be denied. First of all as a creative individual which these funds were intended for have to continually fight for is rightfully meant to be for not lawyers who place themselves in position to collect. 2. They continue to base their claims on data from soundscan that uses "UNIT" as sales where in Digital Technology its, DOWNLOADS, and STREAMS. Therefore their information is no longer valid. Linda's clients (AARC) are for example processing Digital Data figures like 1million streams divided by percentages, described as promo, free, and returns, on the percentage due. In other words their columns are still based on the old 1980's format. (Example included). 3. AARC'S lawyer also by not submitting copies of their correspondence to the CRB Judges to me as an individual claimant, is a violation of procedure and their claims to the 2% by law should be dismissed. 4. So the other reason why were of a personal nature one being that I have to give personal care to the friend I currently live with who has dihibilating

arthritis who has limited function of her arms and hands, no income. I have to provide for the both of us this is why I'm fighting for a share of the remaining 2%.

I pray that your Honors accept my apologizes for missing the original response date and allow me to participate in these ongoing proceedings and grant me as an individual the rights to a share of the remaining 2%, of the Sound recording Fund.

Thank You!

Eugene "Lambchops" Curry / TAJAI MSIC INC.

August 26, 2015.

Exhibit B

UNITED STATES COPYRIGHT ROYALTY JUDGES The Library of Congress

In re

**Distribution of 2013 Digital Audio
Recording Royalty Funds**

**Docket No. 14-CRB-0006 DART
SR (CO/FA) (2013)**

DETERMINATION AND ORDER

The purpose of this proceeding is to distribute to copyright owners and featured recording artists Digital Audio Recording Technologies (DART) royalties deposited with the Licensing Division of the Copyright Office during 2013 under the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1000-1010).

Prior to the commencement of this proceeding, AARC submitted notice that it had reached a settlement with all but five claimants to the 2013 DART Sound Recordings Fund, Copyright Owners' and Featured Artists' subfunds, and requested a partial distribution of 98% of those funds. *See AARC Notice of Settlement and Request for Partial Distribution ...* (Aug. 19, 2014). In December 2014, the Copyright Royalty Judges (Judges) granted AARC's request for a partial distribution of 98% of the DART funds at issue in this proceeding. *See Order Granting AARC's Request for Partial Distribution ...* (Dec. 19, 2014). The Copyright Royalty Judges (Judges) ordered the remaining 2% of the fund held pending settlement or adjudication of controversies raised by the non-settling claimants: David Powell, George Clinton, Eugene Curry, Kami Talpa, and Herman Kelly. All of the non-settling parties were appearing in this proceeding *pro se*. Their filings appeared to claim only from the Copyright Owners Subfund.

The Judges commenced the captioned royalty distribution proceeding by published notice in March 2015. *See* 80 Fed. Reg. 15632 (Mar. 24, 2015). The notice announced April 23, 2015, as the deadline for interested parties to file a Petition to Participate in this proceeding. The Judges received only one valid and timely Petition to Participate (PTP), that of the Alliance of Artists and Recording Companies, Inc. (AARC). The Judges did, however, receive actual notice, in the form of email, late-filed papers, and correspondence, from other parties¹ claiming an interest in the sound recording royalty funds held for copyright owners and featured artists.

In June 2015, AARC, on its own behalf and on behalf of Jeffrey E. Jacobson, Esq. (together, the Settling Parties) requested distribution of the retained 2% of funds in both Sound Recordings subfunds. Because the Judges were aware of the *pro se* claimants, they denied the

¹ *See, e.g.*, papers from George Clinton and Ronald Ford (September, November, and December 2014), Eugene Curry/TAJAI Music (various dates between September 2014, and January 2016), and Herman Kelly (between December 2014 and January 2016).

AARC motion without prejudice and provided a second opportunity for parties in interest to file a PTP, together with an explanation for the failure to file in the first instance. The Judges set a second deadline for PTPs of September 15, 2015. Only Mr. Curry filed a timely PTP, on his own behalf and on behalf of TAJAI Music, Inc. (TAJAI). As Mr. Curry is not an attorney (and thus ineligible to represent a corporate entity in a proceeding, *see* 37 C.F.R. § 350.2), the Judges dismissed the portion of his PTP relating to TAJAI. *See Order Accepting Petition ... and Setting Schedule* (Jan. 7, 2016). Mr. Curry's PTP identified his claim as one to the Copyright Owners' subfund.

AARC subsequently requested distribution of the retained 2% of funds in the Sound Recordings Featured Artists' subfund. The Judges approved this request, finding no controversy relating to the Featured Artists' subfund. *See Order Granting AARC's Request for Final Distribution ...* (Jan. 21, 2016). With regard to the Copyright Owners' subfund, the Judges ordered a paper proceeding under 17 U.S.C. § 803(b)(5). *See Order Granting AARC's Request ...* (Jan. 21, 2016). The "Settling Parties" filed their Written Direct Statement on February 8, 2016. Mr. Curry filed no Written Direct Statement.

On January 28, 2016, the Judges received a paper purporting to be a "Written Direct Statement and Petition to Participate in Respect, Answer to Court's Order Dated Jan 7, 2016" from Mr. Herman Kelly. On the same date, the Judges received Mr. Curry's request for a "partial distribution of the remaining 2% portion" of the Copyright Owners' subfund. The Settling Parties objected to Mr. Curry's request for partial distribution and moved to reject Mr. Kelly's filing. On March 3, 2016, the Settling Parties filed a Motion to Dismiss Eugene Curry/TAJAI Music, Inc.'s Claims to Any Portion of the 2013 Sound Recordings Funds.

Having considered all the filings relating to the 2013 Sound Recordings DART funds, the Judges find:

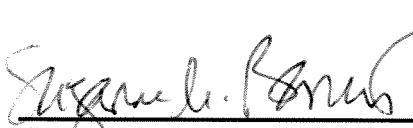

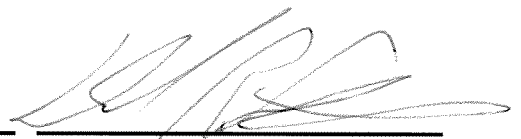
1. Mr. Kelly failed to file a Petition to Participate in this proceeding by the first or second deadline set by the Judges. Mr. Kelly also failed to offer any basis by which the Judges might consider excusable neglect for his failure to make a timely filing, as required by the Judges' procedural rules and orders. The Judges **DISMISS** Mr. Kelly's untimely and invalid PTP. Moreover, even if Mr. Kelly had timely filed his combined "Written Direct Statement and Petition to Participate," the Judges would have dismissed his PTP as deficient, because it failed to (1) state the basis for his claimed interest and (2) provide evidence of sales of any sound recording to which he holds rights. Mr. Kelly's Written Direct Statement also does not provide factual evidence; rather, it asks the Judges to "consider his settlement compromise request for a [*sic*] equal share of the 2% featured recording artist subfund, copyright owners subfund"² Accordingly, Mr. Kelly's filing fails to establish a right to any of the funds remaining in the DART Sound Recordings royalty fund for 2013.

² As noted, the Judges ordered final distribution of the Featured Artists subfund in January 2016.

2. The Settling Claimants presented uncontroverted evidence that neither Mr. Curry nor TAJAI have a right to sound recording royalties for any year. *See* Michael L. Stern WDT at 3-5, Cynthia Oliver WDT at 1.³ The sound recording rights to the music claimed by Mr. Curry are owned by Universal Music Group.⁴ There are no reports of sales of the music claimed by Mr. Curry during 2013. Stern WDT at 3-4.
3. The Settling Parties are entitled to distribution of all remaining funds in the 2013 DART Sound Recordings fund.

Therefore, the Judges hereby **ORDER** that claims asserted by all but the Settling Parties to the 2013 DART Sound Recordings Fund, including both the Featured Artists' and the Copyright Owners' subfunds, are **DENIED**.

As required by 11 U.S.C. § 803(c), the Judges issue this determination, which triggers the deadline for motions for rehearing. *See* 17 U.S.C. § 803(c)(2).

		
Suzanne M. Barnett Copyright Royalty Judge	Jesse M. Feder Copyright Royalty Judge	David R. Strickler Copyright Royalty Judge

DATED: March 24, 2016.

³ The Settling Parties submitted the witnesses' written direct testimony and supporting exhibits in their timely filed Written Direct Statement.

⁴ The Judges make no finding with respect to whether Mr. Curry or TAJAI Music, Inc. has any rights to the musical work underlying the sound recording.

Proof of Delivery

I hereby certify that on Thursday, March 28, 2019 I provided a true and correct copy of the Opposition to Eugene Curry's Motion to Reconsider to the following:

Kelly, Herman, represented by HERMAN KELLY MR served via Electronic Service at hermankelly@att.net

Signed: /s/ Linda R Bocchi